SEP 30 1964

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 335

R. H. WRIGHT, INC., and
ROBERT J. HUMMEL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

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The Government in its Brief in Opposition contends that the information is sufficient and that certiorari should be denied on two grounds.

1. The information alleged a continuous flow of bitumen through petitioner, R. H. WRIGHT, INC., as a conduit to final use; and

2. It alleged that the petitioner's actions had an adverse effect upon commerce.

1. The Continuous Flow Theory.

The information did not properly allege that there was a continuous flow of bitumen through petitioner, R. H. Wright, Inc., as a conduit. The information (R. 12) does charge Paragraph 14:

> "Thus, defendant asphalt suppliers act as conduits through which bitumen flows in a continuous uninterrupted stream in foreign and interstate commerce from points of origin in Venezuela and States other than Florida to its final use in paving surfaces in the Broward County area."

However, this is a legal conclusion and was not admitted by the motion to dismiss (*McJunkin* v. *Richfield Oil Co.*, 55 Fed. Supp. 466, 469 (D.C. Cal. 1940).

It is not sufficient to allege that a certain combination was in restraint of trade. Details must be given so as to show in what manner interstate commerce was restrained. *Toulmin's Anti-Trust Laws,* Vol. 6, Sec. 12.26.

Remaining allegations of the information belie the charge in Paragraph 14.

Paragraph 8 (R. 10) alleges that the bitumen is transported by producers to suppliers through temporary storage facilities owned by the producers or their "terminal agents," at Florida deep water ports. Delivery to terminal agents clearly indicates that the transportation had ended. This is supported by the allegations of Paragraph 9 (R. 10) to the effect that the remainder of the asphalt materials (*i.e.* calcareous and silicious substances available in South Florida) (R. 7) were purchased by the asphalt suppliers from wholesale distributors in Broward County. Thus the information obviously relates to a subsequent mixing of the several ingredients that go to make up hot mix asphalt.

There can be no "practical continuity" as referred to in the *Walling* case, *infra*, where necessary blending occurs with other and different materials.

In holding that there was a continuity of movement the lower court collided with its own decision in *Mitchell* v. *Livingston & Thebaut Oil Company*, 256 F.2d 757 (C.A. 5th, 1958). While this case arose under the Fair Labor Standards Act[1] the court passed upon the question of continuity and held that the purchases of gasoline were made after it had come to rest same. In its opinion the Court said:

> "Similar in many respects to the case before us is Jax Beer Company v. Redfern, 5 Cir., 1941, 124 F.2d 172. Beer made in New Orleans, Louisiana, was sold and shipped to Jax Beer Company in Dallas, Texas. Shipments were by rail. In Dallas the beer was unloaded, for the most part, from the cars into the warehouse of Jax Beer Company. From the warehouse beer was delivered by Jax Beer Company in its trucks by its employees to its customers. Some times beer would be transferred directly from a railway car to a truck for delivery to a retail customer. It was contended that truck drivers of Jax Beer Company were engaged in interstate commerce and entitled to the benefits of the overtime provisions of the Fair Labor Standards Act. In the Jax Beer Company case, as in this case, it was contended that the interstate movement did not come to an end until the goods were delivered to the retailer. The district court so held. This Court rejected the conclusion and reversed the judgment. This Court determined that the work of delivering beer was not interstate in character. We think that in this case the interstate movement terminated when the gasoline was placed in Richfield's storage tanks just as in the Jax Beer Company case it terminated when the beer was

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1. 29 U.S.C. 201 (June 25, 1938, Ch. 676, Sec. 1, 52 Stat. 1060)

placed in the distributor's warehouse. See General Tobacco & Grocery Company v. Fleming, 6 Cir., 1942, 125 F.2d 596, 140 A.L.R. 783."

Respondent additionally claims that the information charges that the shipments were made "in direct response to orders, understandings, or commitments by asphalt suppliers" which it says supports the continuous flow theory.

The charge as to direct orders is as follows:

"12. Thus, substantial quantities of bitumen are sold and shipped by producers and refiners thereof from sources in Venezuela and States other than the State of Florida in direct response to orders, understandings, or commitments by asphalt suppliers to purchase bitumen in connection with specific paving projects in the Broward County area."

Paragraph 12 is plainly a conclusion of the pleader and is not admitted.

Paragraph 11 is obviously defective. It is vague, uncertain and contradictory. It attempts to charge a constant course of dealing between agents of petroleum companies and the asphalt supplier although predicated on the awarding of paving contracts by public authorities.

Respondent contends that this allegation is sufficient under *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564.

The cited case was decided under the Fair Labor Standards Act. However, there is nothing in the opinion to support the lower Court's decision.[2] In *Walling* the sole issue was whether in the case of a wholesale paper distributor which delivered goods to customers in a number

2. At Text 569 the Court said that in *Kirschbaum Co.* v. *Walling*, 216 U.S. 517, 520, it had stated that decisions dealing with Federal powers in the commerce field are not particularly helpful in Fair Labor Standard cases.

of states the act applied to employees at seven branch houses which, though constantly receiving merchandise in interstate shipments and distributing it to these customers, did not ship or deliver any of it across state lines. Significantly, some of the merchandise was shipped directly from the mills to the Paper Company's customers.

In its opinion, the Court said:

> "Certainly they (the two types of transactions) cannot be distinguished from the special orders which respondent receives from its customers. Here also, a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstances that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate. Numerous authorities are pressed on us for the contrary view and for the conclusion that when the goods enter the warehouse, they are no longer 'in commerce'."

The *Walling* case merely holds that in such a case as the one at bar, the oil suppliers' employees would be subject to the Fair Labor Standards Act.

In *Jewel Tea Co.* v. *Williams*, 118 F.2d 202, 207 (C.A. 10th 1941), the Court said:

> "Where goods are ordered and shipped in interstate commerce to meet the *anticipated demands** of cus-

*Emphasis supplied unless noted.

> tomers without a specific order therefor from the customer and the goods come to rest in a warehouse, the interstate commerce ceased when the goods come to rest in the state. It does not continue until the demand eventuates in the form of an order and the merchandise is delivered to the retailer."

See *Brosious* v. *Pepsi-Cola Co.*, 155 F.2d 99 (C.A. 3rd, 1945).

2. The Adverse Effect upon Commerce.

The Government seems to ignore the fact that the commerce, here alleged to have been restrained, is that between Wright and its customers and not that between the oil companies and Wright. The information alleges (R. 15, p. 20):

> "The effects of the aforesaid combination and conspiracy have been and are to unreasonably restrain the hereinbefore-described commerce in the sale and distribution of asphalt materials in the Broward County area by:
>
> (a) Increasing the prices of asphalt materials sold and distributed therein; and
>
> (b) suppressing and eliminating price competition among the defendant asphalt suppliers in the sale and distribution of asphalt materials."

Nowhere is it claimed that the amount of bitumen (or petroleum) shipped into Florida was diminished by reason of any act of the petitioners. In short interstate commerce did not feel the alleged pinch.

It is this commerce and only this with which we are concerned. (*Gibbons* v. *Ogden*, 9 Wheat. 1, 195).

In *Page* v. *Work*, 290 F.2d 323, 330 (C.A. 9th, 1961) (Cert. denied 368 U.S. 323), the Court said that "the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the con-

duct complained of affects the interstate commerce of such business."

U. S. v. *Yellow Cab Co.*, 332 U.S. 218.

In *Toulmin's Anti-Trust Laws*, Vol. 6, p. 404, Sec. 16.9, it is said:

> "A conspiracy with the ultimate object of fixing local retail prices is within the prohibition of these laws *if the means adopted* for its accomplishment *reached beyond the boundaries of one state.*"

The indictment in the instant case affirmatively alleges that the means adopted (price fixing) occurred in and affected "sales and distribution of asphalt materials in the Broward County area". Thus neither the means, nor the effect extended beyond Broward County. The alleged price fixing charged did not occur until after (a) the bitumen had come to rest in Broward County, and (b) it had been processed and manufactured into hot-mix asphalt following purchase from the suppliers. The indictment then alleges that the finished product was sold to consumers in Broward County, Florida. This charge completely negatives any idea that the transaction went beyond Broward County, much less the State of Florida. Thus, the whole operation did not transcend the boundaries of one state. The operation was strictly local and did not affect interstate commerce.

Since this is so, *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 237, heavily relied upon by the government, is of no help to it, as this Court said in that case, "(f)or this is not a case involving only 'a course of conduct wholly within a state'; it is rather one involving 'conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states,' and in such a case it is not material that the source of the forbidden

effects upon that commerce arises in one phase or another of that program."

To remedy the omission in the information, respondent says (Br. 11) that "such price-fixing by the defendants on their sales of asphalt materials would necessarily affect the movement or price of the constituent bitumen in its interstate or foreign flow."

If this is necessarily so, why was it not alleged? The argument is almost an admission that the information is defective.

Besides being a non sequitur, the argument refutes itself. If tanker loads of bitumen are regularly scheduled for shipment and delivery every four to six weeks to the deep-water ports of Florida, as alleged (R. 11), then whether or not an asphalt supplier in Broward County charges his customers a few cents more per ton for hot mix asphalt obviously cannot affect the quantity of petroleum imported into the state.

The petition should be granted.

Respectfully submitted,

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